No. 3523

United States
Circuit Court of Appeals
For the Ninth Circuit.

NEW YORK LIFE INSURANCE COMPANY, a Corporation,

Plaintiff in Error,

vs.

EVELYN E. MASON,

Defendant in Error.

REPLY BRIEF.

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STATE PUBLISHING CO., HELENA, MONT.

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REPLY BRIEF.

As we could not anticipate what questions the defendant in error would raise in her brief, we did not in our brief discuss the principle of *res gestae* declarations. Pursuant to permission granted, we file this memorandum brief to discuss briefly the subjects referred to and which have received some consideration in the brief of the defendant in error.

RES GESTAE DECLARATIONS.

It is suggested that the statements which were made by Mr. Mason to his wife upon her return to the house were a portion of the *res gestae* of the shooting, and, therefore, admissible. This propo-

sition is urged now for the first time, and, seemingly, without any discussion. The subject receives in the brief of the defendant in error only the tribute of a passing glance. We do not dispute the universal application of the rule that *res gestae* declarations are competent. The important question is, are the declarations to which reference is made of that character?

What are such declarations is a matter that has been considered frequently by the Supreme Court of Montana, and we take the liberty of setting forth their essential requirements as declared by that tribunal.

The statements of a driver of a stage coach just after the accident that it would not have occurred had he been watching were not binding on the stage company.

Ryan v. Gilmer, 2 Mont. 517.
Territory v. Clayton, 8 Mont. 1.

Self-serving declarations of plaintiff in an action for personal injuries sustained in being run over by a freight train on which he was riding without paying fare, to the effect that he had been pushed off by a brakemen held not part of the *res gestae,* but mere narratives of a past transaction, and, therefore, properly excluded.

Hulse v. Northern Pacific Ry. Co., 47 Mont. 59.

The statement by a section foreman that an animal was struck by a train and that he afterwards

killed it, is not a part of the *res gestae,* because it was not part of the accident, nor did it spring as a spontaneous voluntary statement induced by the accident.

Poindexter & Orr Livestock Co. v. Ore. Short Line R. R. Co., 33 Mont. 338.

While declarations to be admissible as part of the *res gestae* need not have been strictly contemporaneous with the main incident which gave rise to them, they must have been made while the mind of the speaker was laboring under the excitement aroused by the incident before there was time to reflect and fabricate.

Callahan v. C. B. & Q. Ry. Co., 47 Mont. 401.

See also:

Heckle v. Southern Pacific Ry., 56 Pac. p. 56

An inspection of all of the cases will disclose that in order to make a statement a *res gestae* declaration, the event or occurrence itself must be, as it were, speaking through the party, and the declaration must be the spontaneous voluntary statement induced by the event, and not a narrative of what has already transpired. It seems, likewise, to be a necessary factor in the makeup of such a declaration that the element of deliberation should not exist. Tested by these requirements, the statements under consideration are lacking in essential elements to relieve them of the characteristics of hearsay evidence.

In the case under consideration, we have be-

fore us conduct showing deliberate planning, such as the placing of the money in the envelope, the mental operation of giving directions as to a money dividend payable in stock, and the placing of the envelope in such a manner that it could be readily seen, all followed by such a delay as occurred until the advent of the wife on the scene and all of them so removed from the shooting as to exclude the idea that they were a portion thereof.

But, assuming that they were *res gestae* declarations and admissible as such, still the incompetency of the wife as a witness would render them inadmissible through her. Others, against whom the ban of incompetency did not exist, might testify to them ,assuming that they are *res gestae* declarations, but the statutory provisions which render the wife incompetent as a witness make no distinction between *res gestae* declarations and other declarations. It makes no difference what the communication is, she is rendered incompetent to testify regarding same.

Humphrey v. Pope, 82 Pac. 223.

WIFE'S TESTIMONY.

It will be noticed that the learned trial judge held that the declarations that were made by Mr. Mason to his wife, under the statute, were privileged, but that there was a waiver of the privilege. Now it is contended for the first time that the communications were not privileged at all, and that,

as Wigmore declares, before communications of that character are privileged, the elements must exist to which reference is made in the brief of the defendant in error. Whatever may be the rule of the common law as to the nature of the communications to which the privilege of secrecy attached, there can be no question as to the extent of the privilege under a statute like ours.

In the case of.

People v. Mullings, 83 Cal. 138, 17 Am. St. Rep., 223, 23 Pac. 229,

the Supreme Court of California, considering a statute exactly like the Montana statute said:

> "The provisions of our Codes on the subject of privileged communications between husband and wife are little more than a declaration of the common-law rule upon the subject, except in this respect: the privilege at common law did not extend to communications which were not in their nature confidential; and although such communications were generally held to be confidential, yet some very difficult questions did occasionally arise as to the character of the communications; but our Code sweeps away that embarrassing distinction by extending the privilege to 'any communication made by one to the other during the marriage.' "

The Court then quotes the following declaration by Wharton:

> "There are particular relations in which it is the policy of the law to encourage confidence and to preserve it inviolate; therefore, a person cannot be examined as a witness in the following cases: (1) A husband cannot be examined for or against his wife without her consent; nor a wife for or against her husband without his consent; nor can either, during the marriage, or afterwards, be, without the consent of the other, examined as to any communication made by one to the other during the marriage."

And in approval of this declaration by Wharton, the court used the following language:

> "The rule is founded on public policy, and its purpose, as stated in the clause of the Code just quoted, is to 'encourage confidence, and preserve it inviolate;' and no disclosure can be forced from either spouse without the consent of the one against whom it is sought to be used."

The principle declared in the case of People v. Mullings, *supra,* has been repeatedly adhered to in California.

See the following cases:

In re Flint's Estate, 34 Pac. 863;
Falk v. Wittram, 52 Pac. 707;
People v. Warner, 49 Pac. 841;
Humphrey v. Pope, 82 Pac. 223;
People v. Loper, 112 Pac. 720.

See also:

Watkins v. Lord, 171 Pac. 1133;

Bassett v. United States, 137 U. S. 496, 34 L. Ed. 762.

It was suggested that the provisions of Section 7891 of the Codes of Montana equally with the provisions of Section 7892 were waived. The learned trial judge held that this section had no application at all to the facts in the case. If the court was in error, and the statute is applicable, the principle of waiver is not available, and equally is this true whether the statements are *res gestae* declarations or otherwise. The wife is a party to the instant action, and, under the provisions of the statute referred to, being a party, she cannot testify to any communications with a deceased person.

Respectfully submitted,

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